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Employment and Labour Law Update

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Accommodation of *Family Status*: What Does It Mean?

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Family demographics are changing in Ontario. More and more families have either two working parents or a single parent working alone to support children. Coupled with an aging population and a growing need for elder care, the result has been increased stress on employees and employers alike to strike the right balance between work and home.

As employment lawyers representing employers we are often asked by clients to assist them in meeting their business objectives while at the same time complying with their obligations under the *Ontario Human Rights Code* (the "*Code*"). Our clients already know that the *Code* prohibits certain types of workplace discrimination. The difficulty is in the day-to-day compliance in our ever-changing workplaces. "Family status" is one type of protected ground for which there has been little judicial guidance.

FAMILY STATUS: WHAT DOES THAT MEAN?

Under the *Code* family status is defined as "the status of being in a parent and child relationship". This can also mean a parent and child type of relationship, embracing a range of circumstances without blood or adoptive ties but similar relationships of care, responsibility and commitment; for example, an adult caring for aging parents or relatives with disabilities. Whether this definition will be applied to grandparents and grandchildren and other extended relationships remains open.

WHAT CONSTITUTES UNLAWFUL DISCRIMINATION?

Consider the following example: An employer has a workplace rule that requires all employees to commence work at 8:30 a.m. sharp. On the surface, the rule does not appear to discriminate because it applies to everyone with equal force.

However, even though not intended, such a rule may adversely affect individual employees with family commitments. For example, a parent may be unable to coordinate a daycare schedule with his/her work schedule. Therefore, is the employer required to relax the workplace rule pursuant to its "duty to accommodate"?

The *Code* expressly stipulates that an employer has a duty to accommodate disabled employees, but there is no explicit reference to a duty to accommodate an employee on account of family status. While this might suggest that there is no duty, the Supreme Court of Canada has made it clear that whether or not mentioned in human rights legislation, the duty to accommodate can arise in the context of most prohibited grounds of discrimination.

THE THREE-STEP TEST

When evaluating whether a workplace rule might run afoul of human rights legislation a three-step test is applied:

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1. Is the rule rationally connected to the performance of the job?
2. Did the employer adopt the particular standard in a good faith belief that it was necessary for the fulfilment of a legitimate work-related purpose?
3. Is it impossible to accommodate an individual employee adversely affected by the rule, without imposing undue hardship upon the employer?

The answer to the first two questions is often not the main point of contention; it is the third question that is most frequently controversial.

WHEN IS THE NEED FOR ACCOMMODATION TRIGGERED?

A leading British Columbia Court of Appeal decision indicates that the duty to accommodate, on account of "family status", is triggered if a workplace rule "results in serious interference with a substantial parental or other family duty or obligation of the employee". In other words, the Court recognized that family demands create many potential requests for accommodation, but only the more pressing demands will trigger a legal right to accommodation.

Based on this analysis, a parent who wishes to leave work early in order to attend their child's soccer practice will not trigger the protection of the *Code*. However, a parent who must accompany a severely handicapped child to school is likely to trigger the protection.

Generally, when an obligation is one which only the parent can fulfil, and one which can only be satisfied by revision of a workplace rule, a duty to accommodate will likely to be triggered.

As an employer, if you are asked to accommodate an employee on the basis of family status, your first step is to show an open mind; failure to do so may result in a human rights complaints. Next, collect all available information. This includes giving the employee an opportunity to explain why his or her particular circumstances constitute a substantial obligation and in what manner the workplace rule seriously interferes with the fulfilment of that obligation.

WHAT CONSTITUTES ACCOMMODATION?

The duty to accommodate is not a duty to provide 'perks' to an employee. An employee has a corresponding duty to participate in the search for accommodation, and must be open to all options which will alleviate his or her disadvantage. This may well mean that an employer can satisfy its duty to accommodate by providing a minimal but effective change to a workplace rule or procedure, and not necessarily with the best or most accommodating solution.

In the British Columbia decision referred to above, the Court of Appeal considered medical evidence that the child at issue had a "major psychiatric disorder and that [the parent's] attendance to his needs during after-school hours was "an extraordinarily important medical adjunct" to the son's wellbeing". On the basis of this evidence the Court found that the ability of the parent to be at home during the after-school hours was a "substantial parental obligation" for which the employer should offer accommodation.

WHAT CONSTITUTES UNDUE HARDSHIP?

Assuming that an employee has a demonstrated need for accommodation, the analysis will shift to whether or not the employer is able to accommodate without incurring "undue hardship".

As a rule, an employer is held to a very stringent level of hardship before "undue" hardship will be found. In practical terms, this means that if "undue hardship" becomes the issue over which the employee's request is ultimately decided, the employer will have to establish what is often referred to as demonstrable and exceptionally undesirable connection between an employee's family obligation and their employment.

A FEW ACCOMMODATION SCENARIOS

Shift Change Policy

- If an employer has strict rules in terms of scheduling or changing shifts, these may have to be revisited in the search for accommodation.

Absenteeism Policy

- An attendance management program must be administered in a way which does not punish an employee for an absence under a protected ground.

Leave Policy

- An employer may be required to accommodate an employee beyond the minimum standards provided under the relevant *Employment Standards Act*.

Promotion Policy

- An employer that systematically fails to consider an employee with care-giving responsibilities for promotion may be vulnerable to a claim under the *Code*.

In summary, there are a multitude of considerations under the framework of "family status accommodation". As with so many human rights issues, there is often no simple answer and each case must be considered on its own merits.

What is clear is that an employer must be alert to these issues so that if a family status question does arise it is identified promptly and addressed thoroughly in accordance with the three-step test discussed above.

DID YOU KNOW?

Ontario's minimum wage will increase 75 cents to $8.75 per hour on March 31, 2008. Similar increases to $9.50 and $10.25 are planned for March 31, 2009 and March 31, 2010, respectively. There are certain exceptions including students and employees who serve liquor. For more information please give us a call.

Differential Treatment of Biological and Adoptive Mothers Not Discriminatory

In a recent decision the Federal Court of Appeal reaffirmed that differential treatment of biological and adoptive mothers under the *Employment Insurance Act* (the "*EI Act*") does not violate equality rights under the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

Under the *EI Act*, a biological mother is entitled to receive Employment Insurance benefits ("EI benefits") for 15 weeks of maternity leave and an additional 35 weeks of parental leave for a total of 50 weeks. However, an adoptive mother is only entitled to receive EI benefits for the 35 weeks of parental leave. The adoptive mother is not entitled to collect EI benefits for the 15 weeks of maternity leave.

THE CASE BEFORE THE FEDERAL COURT OF APPEAL

Ms. Tomasson and her husband adopted two children and with respect to each child she applied to the Employment Insurance Commission ("EIC") for maternity and parental benefits. On each occasion the EIC granted Ms. Tomasson parental benefits but not maternity benefits.

Ms. Tomasson appealed the EIC's decision to the Federal Court of Appeal. She argued that her equality rights under section 15 of the *Charter* had been infringed because she was treated differently from a biological mother in a similar situation. According to Ms. Tomasson, as a new mother she ought to be entitled to the same length of EI benefits to which a biological mother would be entitled.

In response, the Government of Canada argued that the two types of EI benefits - maternity and parental - were distinct and justifiable. The 15 week maternity benefit was intended to allow a biological mother time to recover from the physical and psychological trauma of delivery. On the other hand, the 35 week parental benefit was intended to provide both biological and adoptive mothers an opportunity to bond with their new child. Accordingly, neither the purpose nor the effect of the *EI Act's* provisions discriminated within the meaning of section 15 of the *Charter*.

THE COURT'S DECISION

The Federal Court of Appeal agreed with the Government and upheld the EIC's decision for the following principal reasons:

- Pregnancy and giving birth are separate and distinct from child rearing. A biological mother requires time - physically and psychologically - to recover from the former, whereas an adoptive mother does not.
- Maternity benefits provide income replacement to a biological mother while she recovers from pregnancy and childbirth.
- Parental benefits provide income replacement to all parents in the initial stages of child rearing.
- Parliament intended to create these two distinct categories of benefits. In the words of the Court: *"in granting maternity benefits to birth mothers Parliament rightly recognized that pregnancy and childbirth justified the granting of particular benefits by reason of physical and psychological consequences of pregnancy"*.
- Consistent with this analysis is the fact that: a birth father is not entitled to claim EI maternity benefits, nor is a birth mother who gives up her child for adoption entitled to claim EI parental benefits.
- In these circumstances treating a biological mother the same as an adoptive mother would itself be discriminatory. Treating them differently is not.

Regulatory Modernization Act, 2007

Effective January 18, 2008 employers across Ontario must adjust to yet another shift in the regulatory landscape. The *Regulatory Modernization Act, 2007* (the "*Act*") may sound innocuous enough, but it has the potential to pack a mighty punch. The first of its kind in North America, the purpose of the *Act* is to increase cooperation and information sharing among Ontario's thirteen Ministries and Regulatory Agencies.

HIGHLIGHTS OF THE *ACT* INCLUDE:

- Sharing of information, between government ministries, that is collected during inspections or investigations under designated pieces of legislation.
- Creation of "Super-Inspectors" authorized to enforce multiple pieces of regulatory legislation in the context of a single audit or inspection.
- Public disclosure regarding companies that fail to comply with the regulations, including the organization's name, address, details of the complaint, prior convictions, and names of owners, officers and directors.
- Targeting companies that commit regulatory infractions of different types.
- New sentencing guidelines authorizing judges to consider a wrongdoer's broad regulatory record in setting penalties.

WHAT DOES THIS MEAN FOR EMPLOYERS?

Although the *Act* has only recently come into effect it may have broad ranging implications for employers.

First, gone may be the days when a Ministry of Labour inspector can show up at a workplace with the sole authorization to investigate compliance under acts such as the *Occupational Health and Safety Act* or *Employment Standards Act*. Instead, the inspector will have the power to note suspected non-compliance under unrelated regulatory acts, and to disclose this information to other agencies for investigation and prosecution (i.e. environmental or tax legislation).

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Second, unlike in the past, the *Act* allows a judge to consider as an aggravating factor any prior conviction under any regulatory legislation. So, for example, in sentencing a corporate defendant for a conviction under the *Occupational Health and Safety Act*, the court may consider as an aggravating factor a prior conviction under the *Employment Standards Act*, *Workplace Safety and Insurance Act*, *Consumer Protection Act* or any other regulatory act. This may result in potentially steeper penalties for an employer that has breached employment or labour legislation and that has previously been convicted under an unrelated regulatory act.

WHERE TO FROM HERE?

It is too soon to say with certainty how the *Act* will affect the operation of business in Ontario. However, one thing seems clear: this *Act* could have significant implications for employers who are repeatedly found in violation of Ontario's labour and employment statutes.

Accordingly, as the Ontario Government attempts to consolidate its regulatory machinery, an employer should consider finding ways to bring together its own compliance-protocols across disciplines and departments. This includes training managers how to appropriately respond to investigators representing a range of regulatory bodies.

We will keep our readers apprised as this *Act* is applied across the Province. In the interim, if you have any questions about the potential affect of this *Act* on your workplace please contact a member of the Sherrard Kuzz LLP team.

Next in our series of employment and labour law updates:

TOPIC: ***Union Activity in the Workplace - What Every Employer Should Know.***

- Understand the process.
- Know your rights.
- How to react lawfully and effectively to a union campaign.
- Avoid pitfalls that may lead to union certification.
- Do's and Don'ts if your employees attempt to decertify their union.

HReview *Seminar Series*

DATE: Tuesday March 18, 2008: 7:30 – 9:00am. Program at 8:00am, breakfast provided.

VENUE: The Country Club (formerly The Toronto Board of Trade), 20 Lloyd St., Woodbridge, ON 905.856.4317

COST: Please be our guest.

RSVP: **By Monday March 10, 2008 to 416.603.0700 or info@sherrardkuzz.com**

*** HRPAO CHRP designated members should inquire at www.hrpao.org for certification eligibility guidelines regarding this *HR*eview *Seminar*.**

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